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7944—04——0

# In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
*v.*
CHICAGO, MILWAUKEE AND ST. PAUL Railway Company et al. } No. 54.

## STATEMENT OF CASE.

### (a) Nature of the Suit.

This suit was instituted in the name of the United States, by authority of the Attorney-General, in the United States circuit court for the district of Minnesota, second division, under and pursuant to the act of March 3, 1887 (24 Stats., 556) for the purpose of having restored to the United States the east half of the northwest quarter, section 35, township 101, range 28, west of the fifth principal meridian, being eighty (80) acres of farming land located in the county of Faribault, in the State of Minnesota. The United States avers in its bill that on the 29th day of November, 1870, the Southern Minnesota Railroad Company, *improperly and without authority of law, selected such tract of land as within the indemnity limits of said road, in*

*lieu of lands situated within the place limits* of the grant made to the State of Minnesota for the benefit of said road, under the act of Congress approved July 4, 1866 (14 Stats., 87), and that thereafter, to wit, on the 25th of March, 1871, the Land Department of the United States, *erroneously and without authority of law, certified to the State of Minnesota said tract of land* so selected by said railroad company for the benefit of said railroad.

**(b) The Government's Claim.**

The claim of the United States is substantially as follows:

On the 10th day of September, 1866, the governor of the State of Minnesota, having theretofore filed or caused to be filed with the Secretary of the Interior maps designating the route of said road, the Secretary of the Interior, as required by section 5 of the act of July 4, 1866, withdrew from market "the lands embraced within the provisions of said act." At the time of such withdrawal there was a valid homestead claim on the land in controversy, which had been made by one Luman Barclay on June 21, 1866. In the following year, to wit 1867, Michael Donovan submitted conclusive proof before the local land office that Luman Barclay had abandoned his homestead claim, and on the 14th day of January, 1868, Barclay's homestead entry was duly canceled by the Land Department of the Government, and Donovan was duly notified of such fact. The cancellation of Barclay's entry left the land in controversy open to selection by

the first legal applicant (*Ryan* v. *Railroad Co.*, 99 U. S., 382; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496). On June 6, 1868, Donovan went to the local land office and applied to enter the land embraced within the homestead entry of Luman Barclay, 80 acres of which was the land here in controversy. The claim of the Government is that the local land office unlawfully and wrongfully refused to permit Donovan to enter as a homestead the land here in question, and that he is still entitled to enter said land, for the reason that the Southern Minnesota Railroad Company did not select the same as indemnity land until November 29, 1870, prior to which time Donovan had entered upon and taken possession of said land with a view to entering the same under the homestead laws of the United States, and that the certification from the United States to the railroad company was not merely voidable but absolutely void.

**(c) Facts Relating to Donovan's Claim of Title.**

The facts in this case are briefly as follows:

On the 4th day of July, 1866, Congress made a grant of land to Minnesota to aid in the construction of a railroad in the southern part of that State. The grant was of the odd-numbered sections within ten (10) miles of the line of the road, as the same should be located, with the right to select indemnity lands within twenty (20) miles of the line, in lieu of lands within the ten (10) mile place limits. The grant was turned

over by the State of Minnesota to the Southern Minnesota Railroad Company on February 25, 1867. (Stipulated facts, Record, p. 113.)

Prior to the passage of said granting act, to wit, on the 21st day of June, 1866, one Luman Barclay duly entered the east half of the northwest quarter of section 35, township 101, range 28, west of the fifth principal meridian, in Faribault County, Minn., being the land in controversy in this suit, in connection with the adjoining 80-acre tract in section 26 of said township and range, as a homestead. In the following year, to wit, 1867, Barclay was called to Canada and was absent for over six months. He wrote to a friend living near this land, stating that he would not return to the United States to claim his homestead, and that it could be taken by anyone else.

At that time one of the appellees, Michael Donovan, had arrived with his family from Wisconsin and was stopping with a friend near Winnebago City, where the local land office of the United States was then located. Donovan had come to Minnesota in 1867 for the purpose of acquiring a homestead on Government land, and was informed of the action of Luman Barclay. He accordingly went upon and examined this Barclay land, and having concluded to enter it as a homestead, went to the United States local land office for that purpose. There he was informed by the register of the land office that he could not enter this land as a homestead until the Barclay entry was canceled, and that if he wished to make a claim that Bar-

clay had abandoned his entry he should publish notice of the time and place where he would make proof upon that matter. Donovan accordingly paid $9 for the cost of publishing such a notice for three weeks, and appeared at the time and place designated, to wit, the fore part of August, 1867, and made conclusive proof that Barclay had abandoned his homestead claim. Nothing was said at that time about any of the land having been withdrawn from market or that it would not be subject to a homestead claim when the Barclay entry was canceled, but Donovan was given to understand that he could enter the land as a homestead as soon as the local land office received notice from the General Land Office at Washington that the Barclay entry was canceled. Donovan accordingly had an application made out to enter both tracts of land, leaving the date blank, to be filled in when he should apply to enter the land after the cancellation of the Barclay entry, and left the same with the local land office and returned onto the land which he had applied to enter, and commenced the erection of a house on the tract in section 26 and commenced the cultivation of the tract in section 35. This was in the fall of the year 1867.

The Barclay entry was duly canceled by the land department of the Government on the 14th day of January, 1868, and notice given to the local land office, and Donovan was notified of that fact. On or about the 6th day of June, 1868, Donovan went to the local land office again and applied to enter said tracts of land, but he was then informed by Mr. Bullis, register of the

land office, that the land within 20 miles of the line of road had been withdrawn from the market, and that the 80-acre tract in said section 35 was within the indemnity limits of the grant and within 20 miles of the located line of road, and that, therefore, he, Donovan, would not be permitted or allowed to enter the 80 acres in section 35 as a part of his homestead. Donovan was thereupon allowed to enter the 80-acre tract in section 26, but was prevented by the local land officers from entering the 80-acre tract in section 35. When Donovan initiated the contest against Barclay in 1867, he signed a paper which was called an application to enter the land in controversy. This paper was in blank as to date, and it was undoubtedly to be filled out when the Barclay entry should be canceled, but when the entry was canceled this paper was destroyed. It was claimed by the local land office that the land was not subject to entry, for the reasons hereinbefore stated. Donovan used the land in connection with his 80-acre homestead in section 26 from the fall of 1867 up to the year 1885, when one Thomas Thompson went into possession of the same, as assignee of the contract made by the Southern Minnesota Railway Company, and under and in pursuance to which, title to the land was finally conveyed to O. C. Erichsrud. On the 26th day of June, 1883, Donovan duly applied at the local land office to enter as a homestead said tract of land in said section 35, which application was rejected upon the ground that the land so applied for had been certified to the State

of Minnesota for the benefit of said railroad company, from which refusal Donovan duly appealed to the Commissioner of the General Land Office, where said matter is still pending and undetermined. This application of Donovan to enter the tract of land in 1883 was duly filed, and his rights thereunder were determined by the local land office at that time. Donovan has not been in possession of the land since 1885. The circuit court, although denying that Donovan had any right to enter the 80-acre tract in question, yet found as a fact (Record, p. 203) that Donovan applied to enter the land on June 6, 1868, after the Barclay entry had been cancelled. The court's finding upon this subject is in the following words:

> It appears that he did apply to enter this land as a homestead in the following June, and after the action of the General Land Office directing the vacation of the previous entry had been noted on the records of the local land office.

It appears also that after Donovan had occupied these lands for more than five years, he made proof of his occupation and cultivation in 1875 of the 80-acre tract in section 26, and at the same time offered to make like proof of his occupation and cultivation of the 80-acre tract in section 35. The court below also found that Donovan not only applied to enter the tract in section 35, but also paid the cost thereof, to wit, fifteen dollars ($15), of which ten dollars ($10) was the price of the land, and five dollars ($5) the expenses connected therewith. (Record, p. 66.)

**(d) Facts Relating to the Railroad Company and its Grantees.**

The land in controversy is within the indemnity limits of the act of July 4, 1866 (14 Stats., 87).

On November 29, 1870, the Southern Minnesota Railroad Company selected the 80-acre tract of land in controversy in lieu of lands within the place limits, and the land department certified said land to the State of Minnesota for the benefit of said railroad company on March 25, 1871, and the State of Minnesota conveyed said land to the railroad company August 8, 1871. This land, as above stated, was sold under a mortgage foreclosure to A. P. Mann and H. H. Camman in February, 1877. It was conveyed by Mann and Camman to the Southern Minnesota Railway Company March 3, 1877, and by said railway company conveyed to O. C. Erichsrud on March 20, 1888.

The Southern Minnesota Railroad Company should be distinguished from the Southern Minnesota Railway Company. The Southern Minnesota Railroad Company, in March, 1868, made a mortgage upon its property, including said land grant, to secure an issue of bonds, which mortgage was foreclosed in the United States circuit court for Minnesota in 1877, and the mortgaged property duly sold to A. P. Mann and H. H. Camman in trust for the bondholders secured by said mortgage; and thereafter, on the 3d day of March, 1877, the said purchasers, under the laws of the State of Minnesota, duly organized a new corporation, by the name of the Southern Minnesota Railway Com-

pany, and conveyed to said railway company all said property so purchased at said foreclosure sale.

Prior to the conveyance to Erichsrud by the railway company, to wit, on the 5th day of January, 1885, the railway company entered into a contract with one A. Boysen for the sale and conveyance of said land to Boysen, which said contract on the following day was assigned to one N. C. Fredericksen, and on the 1st day of April, 1885, was assigned by Fredericksen to Thomas Thompson, and by said Thompson was, on the 3d day of February, 1888, assigned to O. C. Erichsrud. O. C. Erichsrud died intestate on March 27, 1888, and on November 6, 1898, the land in controversy was decreed by the probate court of Faribault County, Minn., to Anna Erichsrud, widow of deceased, Addie J. Erichsrud, Julia P. Erichsrud, and Mabel H. Erichsrud, as heirs at law of O. C. Erichsrud, deceased. On May 24, 1899, these heirs at law conveyed the same to the defendant Louis K. Woodwick for the sum of two thousand dollars ($2,000) cash.

**(e) Facts Relative to the Controversy Between Donovan and Thompson.**

The railroad company having, on the 5th day of January, 1885, by a contract in writing, agreed to sell said tract of land in question in section 35 to Boysen, and said contract having been assigned to Fredericksen and by him assigned to Thompson, on the 1st day of April, 1885, said Thompson, shortly after receiving the assignment of said land, forcibly took possession of the

tract of land in question, which had been in possession of said Donovan for about eighteen years, and was then under cultivation. Donovan, upon being dispossessed of said land by Thompson, brought an action in the State court to regain possession of said tract. This suit was instituted in 1885, in the district court of Faribault County. The case was pending in that court for about two years, when on the 24th of March, 1887, the State court decided that Donovan had no title to said land, nor right to possession of the same, and that Thompson had the right to the possession thereof under the Boysen contract, which had been assigned to, and held by, Thompson. Judgment was not entered, however, in said case, until the 4th day of January, 1888 (Rec., p. 185). (With reference to the commencement of the suit and possession, see Rec., p. 116.)

In 1888, after the passage of the act of Congress of March 3, 1887, Donovan, having been beaten in the State court, appealed to the Land Department at Washington for relief under said act of Congress, which application is evidenced by the affidavits of Donovan, Mr. Bullis, and Mr. McLaughlin. (Rec., pp. 88, 89, 90.) The letter from the Commissioner of the General Land Office to the Secretary of the Interior relative to Donovan's claim will be found on page 118 of the record, and the letter of the Secretary of the Interior to the Commissioner of the General Land Office upon the subject will be found on page 120 of the record, and the letter of the Commissioner in reply to the Secretary appears on page 127 of the record. On April 16, 1890,

the Secretary of the Interior having found that Donovan was unlawfully and wrongfully deprived of his right to enter the land in controversy, and that the railroad company and its grantees had no title thereto, addressed a letter to the Attorney-General (Rec., p. 128), transmitting the papers in said case, with the request that suit be instituted to have the certification of said land to the State of Minnesota set aside and canceled. It thus appears that by direction of the Secretary of the Interior this suit was instituted in 1893 by the Attorney-General of the United States, and has been pending ever since that time.

At the time of the commencement of this suit, the defendants—O. C. Erichsrud and Thomas Thompson—were not found or served with process, Erichsrud having died March 27, 1888—five years before the commencement of this suit. On May 24, 1899, Erichsrud's widow and children conveyed the land in question by warranty deed, to the defendant Woodwick, all of whom have since been made parties defendant by supplemental bill filed March 4, 1901. (See stipulated facts, Roman Numeral VIII, Rec., p. 115.)

**(f) Facts Relating to the Suit.**

On March 6, 1893, the United States filed its bill of complaint in the above-entitled cause against the Chicago, Milwaukee and St. Paul Railway Company, the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, and O. C. Erichsrud. (Rec., pp. 1–8.) On the 20th day of June, 1894, the

United States filed an amendment to said bill of complaint, under and pursuant to an order of court.

Service of subpœna was made on the railway companies and Donovan, and on August 11, 1894, said companies answered the bill. Donovan did not answer the bill until March 6, 1901, and then by his answer confessed the same and prayed that the relief asked for might be granted. On March 4, 1901, a supplemental bill was filed by the United States in said action, wherein it was stated that no service had ever been made upon Thompson or Erichsrud, and that no testimony had ever been taken in the case; that O. C. Erichsrud had departed this life since the commencement of the action, leaving surviving him Anna Erichsrud, his widow, Addie J. Erichsrud, Mabelle Erichsrud, and Julia P. Erichsrud, his children, and only heirs at law, and that on June 24, 1899, said heirs had joined in a deed conveying the land in question to Louis K. Woodwick. *This supplemental bill further stated that such suit by stipulation or understanding of counsel had not been moved, but was allowed to stand over, without prejudice, awaiting the decision of certain cases pending in the United States Supreme Court, which it was thought might have a bearing upon the facts in said suit.* Process was prayed against these last-named defendants, and on May 2, 1901, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly Erichsrud), Julia P. Remington (formerly Erichsrud), and Louis K. Woodwick answered the bill and supplemental bill. Replication having been filed to said several separate

answers, the court appointed a special examiner to take and report the testimony in the case, and return the same to the court. (Rec., p. 46.) On the 13th day of January, 1902, the special examiner submitted to the court his report of the testimony taken in said suit. (Rec., p. 195.)

### SPECIFICATION OF ERRORS RELIED UPON.

The appellant complains of certain errors committed by the circuit court of appeals and of certain other errors committed by the circuit court. In our opinion, it is not only necessary to consider the errors which we allege were committed by the circuit court of appeals in rendering its decision in this case, but also the errors committed by the circuit court.

#### (a) Errors Complained of in the Circuit Court of Appeals.

I. The circuit court of appeals erred in holding and deciding that the United States had no interest in the land involved in this suit, and that the whole object of the action is to restore the land to the United States so that it may convey to Michael Donovan.

II. That court also erred in holding and deciding that the act of March 3, 1887 (24 Stat., 556), does not affect the rule as announced in the case of the *United States* v. *Beebe* (127 U. S., 338).

III. The court erred in holding and deciding that the statute of limitations, as expressed in section 5134, General Statutes of Minnesota, 1894, is applicable to the facts in this case.

IV. The court erred in finding and deciding that the doctrine of laches is applicable to the facts in this case, and in holding that in equity and in good conscience such doctrine should be applied.

V. The court erred in not finding and deciding that the facts show that the claimant, Michael Donovan, obtained a right to the land in controversy, superior to the Southern Minnesota Railway Company.

VI. The court erred in finding and deciding that the decree in the court below was for the right party, and in affirming the same.

**(b) Errors Complained of in the Circuit Court.**

I. The circuit court erred in holding that the lands within the indemnity limits of the grant were withdrawn from market on September 10, 1866, and in holding that the cancellation of the Barkley entry on January 14, 1868, did not restore the lands to market and therefore that the application to enter the land in question by Donovan was properly rejected.

II. The circuit court erred in refusing to find as a fact from the evidence that Donovan took possession of the land in question at the time of his application to enter the same, and immediately improved and cultivated and continued in the sole and uninterrupted possession of the same, occupying and cultivating it as required by law, continuously, down to the year 1885; and having fully complied with all the requirements of the law with respect to homesteading said land secured a vested interest in the land of which he could not be deprived by an act of Congress.

III. The circuit court erred in holding that the defendant Woodwick had title to said land under the act of March 3, 1887.

IV. The court erred in failing and refusing to hold that the certification of the tract of land in question by the Land Department to the State of Minnesota was absolutely void and passed no title.

V. The court erred in not holding that the plea of the statute of limitations and of laches could be invoked against the Government in this suit.

## POINTS, AUTHORITIES, AND ARGUMENT.

In the argument of this case some confusion may be avoided by arranging the points to be discussed in their proper order. We have accordingly divided the argument into three parts, as follows:

(1) Errors committed by the circuit court of appeals.

(2) Errors committed by the circuit court and disregarded by the circuit court of appeals.

(3) The real point upon which this case must be decided, all others having been resolved in favor of the Government.

## PART ONE.

### ERRORS COMMITTED BY THE CIRCUIT COURT OF APPEALS IN ITS DECISION.

There are several legal propositions enunciated by the circuit court of appeals in its opinion, which, while in the abstract are correct statements of the law, are not applicable to the facts as disclosed by the record in this case and to which we take exception.

I.

**When the Government is a *mere formal* complainant in a suit, not for the purpose of asserting any legal right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the United States alone.**

**United States v. Beebe (127 U. S., 338.)**

The circuit court of appeals held that the case at bar should be decided in accordance with the principle of law laid down by this court in the Beebe case (*supra*), and held that "it conclusively appears by the record in this case that the United States has no interest in the land itself, and that the whole object of the action is to restore the land to the United States in order that it may convey it to Donovan," and "the fact that this

action is claimed to have been brought under the act of March 3, 1887 (24 Stat., 556), can not affect this rule."

Our contention is that there is a clear distinction between the interest which the Government has in the prosecution of this case and the interest which it had in the prosecution of the Beebe case. It is not necessary that the United States should have a pecuniary interest in the lands sought to be recovered, and we maintain that the United States could possibly have no greater interest in the lands sought to be recovered in this suit than has been manifested in the positive assertion on the part of Congress by the act of March 3, 1887, that the Government should henceforth undertake as a part of its avowed policy, not only the adjustment of these various land grants to railroad companies, but should assume and conduct all litigation for and in behalf of its citizens who had been deprived of their rights under its homestead and preemption laws, and that the prosecution and determination of their rights as against the railroad companies should be conducted by the Government, in order that its citizens might enjoy the benefit of their rights under the law.

We maintain that the circuit court of appeals has entirely misconstrued the purpose and object of the act of Congress of March 3, 1887. The Government, by the passage of that law, invited settlers in the situation in which Donovan found himself, contending single handed and alone against a great corporation, to commit their cause to its charge, and that it would undertake, as a governmental function and a matter in

which the Government should thereafter have a direct and positive interest, the litigation of their controversies with the railroad companies. This is evident, not only from a careful examination and analysis of the law itself, but also from the decisions of the courts which have been rendered wherein this act has received judicial consideration. We expect to show that this was the purpose of Congress; first, from an examina- of the act under which this suit was instituted, and second, from the decisions of the Federal courts in cases brought under the provisions of said act.

**Act of March 3, 1887 (24 Stat., 556).**

We maintain that Judge Carland, in delivering the opinion of the circuit court of appeals in the case at bar, has neglected to give proper consideration and significance to the object and purpose of the various provisions of the act of March 3, 1887.

The court says:

> The act referred to simply confers the right to bring this action after demand and refusal to convey. It does not say that the Government shall recover in any event. If this had been the object of Congress, it would have been easier to have divested the title by the act itself without going into court, which of course could not have been done. (116 Fed. Rep., 972.)

The most superficial examination of this law shows very clearly that Congress intended to do more than "simply confer the right to bring this action after demand and refusal to convey."

The first section of the act is as follows:

> That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

This provision of the law imposes a direct and positive obligation upon the Secretary of the Interior to adjust railroad land grants. The Secretary of the Interior is not only authorized to make such adjustment, but is directed to do so.

Section 2 of said act is as follows:

> That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands,

and to restore the title thereof to the United States.

Section 3 of the act is as follows:

> That if, in the adjustment of said grants, it shall appear that the homestead or preemption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to prove his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

These three sections of the law above quoted must be interpreted and considered together, and it seems to me that the only reasonable inference which can be drawn is that the Government has assumed an interest in the prosecution of this suit which can not be confined to a pecuniary interest, and that the circuit court of appeals did not give sufficient importance to the object of the law when it said that "the act simply confers

the right to bring this action after demand and refusal to convey."

But it was necessary for the circuit court of appeals to thus minimize and limit the interest of the Government in the prosecution of this suit, under this act, in order to bring the case within the rule of law announced in the case of the *United States* v. *Beebe* (*supra*). The whole decision of the circuit court of appeals is constructed upon the assumption that this case is ruled by the principle of law announced in the Beebe case, and that the act of March 3, 1887, confers upon the Government no additional interest in the event of a suit, either pecuniary or otherwise. If this premise can be shown to be fallacious, the whole argument which sustains the opinion of the circuit court of appeals in the case at bar falls to the ground. It is, however, unnecessary, plain as is the construction of the statute, to rest our assertion here. This statute has received the careful consideration, not only of this court, but of the circuit court of appeals of the eighth circuit, whose decision we are now assailing.

**United States v. Winona and St. Peter Railroad Co. (67 Fed. Rep., 969, 971).**

> It may be conceded that if Marshall, the preemptor, had brought a suit in 1891, when this suit was commenced, to obtain a decree to the effect that the title of the land company was held by it in trust for him, the statute of limitations of Minnesota and his own laches would have defeated him. (*Railroad Co.* v. *Sage*, 4 U. S.

App., 160, 1 C. C. A., 256, and 49 Fed., 315.) Nor is it denied that "when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone." (*United States* v. *Beebe*, 127 U. S., 338, 347, 8 Sup. Ct., 1083; *Curtner* v. *United States*, 149 U. S., 662, 674, 13 Sup. Ct., 985, 1041.) But the United States sustains no such relation to this suit. The act of Congress of March 3, 1887 (24 Stat., 556), made it the duty of the Secretary of the Interior to adjust the land grant of the Winona Company, and to demand the reconveyance to the United States by that company of any lands erroneously certified to the State for the benefit of the company. This tract of land was erroneously certified for the benefit of the Winona Company, and the Secretary demanded its reconveyance. The act of Congress required the Attorney-General, in case the railroad company should fail to reconvey the land within ninety days after the demand of the Secretary, to bring this suit or a like proceeding to cancel the certification to the State and to restore the title of the land to the United States. The railroad company failed to reconvey for ninety days

after demand, and the Attorney-General exhibited this bill as the act of Congress directed him to do. The only evidence tending to show that this suit was instigated by Marshall, or that it is prosecuted for his benefit, is the fact that he filed a petition with the Commissioner of the General Land Office in November, 1887, for a reinstatement of his preemption rights. It can not be presumed that this petition was the only or the approximate cause of the institution of a suit which Congress had directed to be brought in any event. It was the duty of the Secretary of the Interior and the Attorney-General to investigate this case and to prosecute this suit, regardless of the application of Marshall. That the faithful discharge of the duties of Government may result in the protection or restoration of the rights of individuals does not deprive those duties of their public character or privileges. Moreover, the United States is not without interest in this suit. If Marshall's claims as a preemptor are ultimately sustained, the Government will receive from him at least the minimum price of the land (sec. 2259 Rev. Stat.); and, if they are not sustained, they will have the land itself.

Our conclusion is that the United States has a pecuniary interest in the result of this suit; that it is brought and is prosecuted by the direction of Congress to protect the public interests and to discharge the duties imposed upon the United States as a sovereign Government; and that the Government is entitled to the benefit of its exemption from the statute of limitations and

> from laches in this case. The decree below must be reversed and the cause remanded, with directions to enter a decree for the relief prayed in the bill; and it is so ordered.

This opinion of Judge Sanborn is perhaps one of the best considered opinions wherein the act of March 3, 1887, has received consideration by the Federal courts. A suit instituted under this law, so far as the Government's interest in the event of the suit is concerned, is clearly distinguished from those suits of which the Beebe case is a good example. The circuit court of appeals recognized in positive language that the United States, in a suit brought under this law, was something more than a mere conduit through which one private person was conducting litigation against another private person. "It can not be presumed," said the court, "that this petition was the only or approximate cause of the institution of a suit which Congress had directed to be brought in any event. It was the duty of the Secretary of the Interior and the Attorney-General to investigate this case, and to prosecute this suit, regardless of the application of Marshall. That the faithful discharge of the duties of government may result in the protection or restoration of the rights of individuals does not deprive those duties of their public character or privileges." It is true that the court went on to say, under the peculiar facts in that case, because it happened to be a preemption case instead of a homestead case, that "the United States is not without interest in this suit. If Marshall's claims as a preemptor are ultimately sustained, the Government will

receive from him at least the minimum price of the land (sec. 2259, R. S.); and if they are not sustained, they will have the land itself." But our contention is that the principle of law which the circuit court of appeals enunciated in rendering the opinion in the Marshall case, and which was thereafter affirmed by this court, would have been just as sound had the Government no pecuniary interest in the result of the suit. The Government's interest, under the act of 1887, in the discharge of those duties and privileges of a public character, was sufficient to except it from the ruling in the Beebe case.

**Oregon and California Railroad Co. v. United States (189 U. S., 103, 104).**

This was a suit brought under the act of Congress of March 3, 1887, to compel the reconveyance of lands covered by patent issued in 1893, on the ground that it included land to which there were adverse claims of settlers to the land on which they respectively resided, and which the United States now claimed for them.

Mr. Justice Harlan, in delivering the opinion of the court, took occasion to point out the purposes which Congress had in mind when it passed this law. He said:

> In *United States* v. *Missouri, &c., Railway* (141 U. S., 360, 380, 382), which was an action brought by the United States after the passage of the above statute to have certain patents for land canceled, this court, after observing that

as to some of the lands the United States appeared to have a direct interest in them, said: "As to others, it is under an obligation to claimants under the homestead and preemption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title, by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the Government owed as well to the public, as to the individuals who acquired rights, which the patents, if allowed to stand, may defeat or embarrass." Reference was made in that case to *United States* v. *San Jacinto Tin Co.* (125 U. S., 273, 286), in which it was held that the United States could sue to set aside a patent improperly issued, where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own; also, to *United States* v. *Beebe* (127 U. S., 338, 342), in which it was held that patents procured by fraud could be canceled at the suit of the United States where that was necessary to be done in order that it might fulfill its obligations to others. The court then observed: "These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each

one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice." (See also *United States* v. *Oregon, &c., Railroad Co.*, 176 U. S., 28.)

Our conclusion is that Congress, by the enactment of this law, clearly recognized the difficulty and great expense which individual claimants would be compelled to meet were they to conduct litigation of this character in their own name. The Government, therefore, invited such claimants to place their controversies with the railroad companies and their grantees under the full charge and control of the Attorney-General. And not only did Donovan, but hundreds of other settlers, after the enactment of this law, accept the invitation of the Government to litigate the rights of which they had been deprived by the negligence and and wrongful acts of the officers of the Government. And the interest of the Government, in the event of such suits, is to be measured, not according to the money value which the Government might realize, but in accordance with the interest which the Government has declared itself to have in seeing to it that these land grants are properly adjusted, and that the individual claimants who are entitled to the land may be permitted to enter the same under the protection of the Government and at the expense of the Government.

Having shown, therefore, that the circuit court of appeals was in error when it held that this case fell within the principle of law announced in the Beebe

and San Jacinto cases, it is apparent that the subsidiary question of negligence and laches upon the part of Donovan can have no application in the further consideration of this case, for if the Government has an interest, as we assert, the doctrine of laches can have no application to the case at bar. We will, however, at the risk of considering a question which we deem immaterial, briefly discuss the second point made by the circuit court of appeals, viz., that this case is one in which the doctrine of laches should be applied.

## II.

**The laches, if any, were the laches of the officers of the United States, and not of Donovan.**

We have no fault to find with the opinion of the circuit court of appeals for the eighth circuit in the case of *Kelly* v. *Boettcher* (85 Fed. Rept., 55, 62), in which the rules which govern the application of the doctrine of laches are exhaustively discussed.

The rule as stated in that case is as follows:

> The settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character.
>
> * * * * *
>
> When a suit is brought within the time fixed by the analogous statute the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and when such a

> suit is brought after the statutory time has elapsed the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case.

After stating the rule as above quoted, the circuit court of appeals said:

> We think that the evidence in this case not only does not show that it would be inequitable to apply the doctrine of laches, but, on the contrary, the evidence shows that in equity and good conscience it ought to be applied. O. C. Erichsrud, as assignee of the contract held by Thompson, paid the balance due on the contract to the Southern Minnesota Railway Company, and received a deed for the land in controversy March 20, 1888. At this time Erichsrud seems to have had no notice of the claim of Donovan. Donovan was out of possession, and there was no claim of record. On May 24, 1899, when Woodwick purchased the land from the Erichsrud heirs, paying $2,000 therefor, O. C. Erichsrud had not been served with subpœna, and the heirs were not parties to this action. If Erichsrud was an innocent purchaser, then Woodwick obtained whatever title Erichsrud could convey. This suit, at the time Woodwick purchased, was not lis pendens, as Erichsrud had not been served with subpœna. (*Murray* v. *Ballou*, 1 Johns., Ch. 566; *Union Trust Co.* v. *Southern Inland Nav. and Imp. Co.*, 130 U. S., 570, 9 Sup. Ct., 606, 32 L. Ed., 1043.)

We contend that the circuit court of appeals failed to give due consideration to the equities in applying the doctrine of laches to the facts in this case.

Michael Donovan settled upon this 80-acre tract in 1867, and in June, 1868, when the land was open to selection and subject to entry by the first legal applicant as a part of the public domain, Donovan applied to the local land office to enter this 80-acre tract as a part of his homestead, and was wrongfully and illegally prevented from so doing by the officers of the Government. He, however, went back upon the land and continued to cultivate and improve it until 1875, when he offered "to prove up on it," along with his final proof made at that time before the local land office with respect to the adjoining 80-acre tract in section 26. He was again refused permission so to do, but he still continued to reside upon and to cultivate the land from that time until 1885, when he was dispossessed by Thompson. In 1883 Donovan again applied to enter the land, but his application was rejected by the local land office. This application was, however, remanded, and an appeal taken by Donovan to the Commissioner of the General Land Office, where the matter is still pending. Donovan thereupon brought suit in the State court for the purpose of asserting his right to the possession of the land, and the case was held by that court under consideration for more than two years, when judgment was rendered against him in 1888. In the meantime, on March 3, 1887, Congress had passed this act, practically inviting Donovan, together with thousands of other settlers, to submit their litigation with the railroad companies and their grantees to the Secretary of the Interior and the Attorney-General. Dono-

was immediately accepted this invitation and did everything in his power to secure a speedy determination of this controversy. It is true that he neglected to take an appeal from the decision of the State court. But if the United States then had an interest in this land, the judgment of the State court was clearly no bar to a prosecution of this suit by the United States, and inasmuch as the Government had assumed this duty under the law to litigate this controversy with the railroad company, Donovan was certainly justified in submitting his interests to the control of the Government. The Attorney-General instituted this suit in 1903, and the railroad companies only were served with subpœnas. It was clearly not the duty of Donovan to see to it that service was properly made upon all the defendants in that suit, or that all persons interested in the land were made parties. In 1907 the United States filed a supplemental bill bringing in additional parties, and omitting "that said action by stipulation or understanding of counsel was not moved but was allowed to stand over, without prejudice, awaiting the decision of certain cases which it was thought might have a bearing upon this action." The case was thereupon prosecuted to a final determination by the United States, and because the officers of the Government failed and neglected to bring into the suit by a supplemental bill the Echaveal heirs, before the statute of limitations had run, such negligence and omission upon the part of the officers of the Government in a suit which the statute commands it to institute, is now held by the circuit court of appeals to be chargeable to Donovan.

We maintain that whatever laches existed in connection with the facts in this case were the laches of the officers of the Government and not of Donovan; and that he, Donovan, has at all times been vigilant and has done everything that might reasonably be expected under the law for the purpose of asserting his rights in connection with this land. Donovan had no control over this litigation under the act of 1887. He was, in fact, one of the parties defendant to that suit, and we can not appreciate the logic which holds that after the United States had assumed full charge and control of the prosecution of this case in the performance of a governmental duty, and with the view of protecting either directly or incidentally whatever rights Donovan might have to the land, that it was necessary for Donovan to have instituted a separate and independent suit in order to prevent the statute of limitations from running against his interest and claim to this 80-acre tract.

It seems to me, therefore, that the evidence in this case clearly shows, with all due deference to the opinion of the circuit court of appeals, that it would be inequitable to apply the doctrine of laches, and that in equity and good conscience such doctrine ought not to be applied.

Let us examine for a moment the equities in the case as between Donovan and Woodwick, without regard to the application of legal principles. The circuit court of appeals in the concluding portion of its opinion said:

> It is claimed that Woodwick can not be an innocent purchaser, for the reason that he or his

> grantors never had the legal title. Whether the certification of the land in question under the facts as they appear in this case carried the legal title, or whether Woodwick can be said to be in a technical sense an innocent purchaser, we do not care to determine. He certainly occupies a position which appeals to a court of equity to such an extent as to justify this court in refusing relief after the statute of limitations at law has run.

The Government contends, of course, that neither the railroad company nor its grantees ever had the legal title to this 80-acre tract of land in section 35. This we will discuss at length under Part Three. If the railroad company never obtained title to the land in controversy—and under the facts it conclusively appears that the State of Minnesota and the railroad company were never entitled to receive a patent to this land from the Government—it is clear that the railroad company would not lose anything by having this land reconveyed to the United States, in order that Donovan might enter the same as a homestead. On March 20, 1888, the Southern Minnesota Railway Company conveyed this 80-acre tract to O. C. Erichsrud by warranty deed (Rec., pp. 171, 172) for and in consideration of $480. About a week thereafter Erichsrud died intestate, leaving certain heirs. It is clear that, if, for any reason, there was a breach or a failure of the warranty, the heirs of Erichsrud are in a position to recover from the Southern Minnesota Railway

Company. On May 24, 1899, the widow of Erichsrud and his children conveyed by warranty deed said 80-acre tract to Louis K. Woodwick, for and in consideration of $2,000 (Rec., p. 176), and Woodwick is now protected to the amount of the purchase price of the land by the warranty contained in said instrument. From this we see that Woodwick, the appellee, is protected, in the amount of money which he has expended, by his warranty in the deed of conveyance, and the Erichsrud heirs are protected in the transaction which their father had with the railroad company by the provision contained in the deed of conveyance from the railroad company to Erichsrud; and the railroad company, even though they should be compelled to return this money to the Erichsruds, is not deprived of any interest or benefit, for the reason that the railroad company never had, and was never entitled to have, any interest in the 80-acre tract erroneously certified and conveyed to the State of Minnesota for its benefit. Therefore, if the United States should prevail in this suit, and Donovan should eventually be permitted to enter the land in controversy as a homestead, none of the appellees would be injured to such an extent that they could not be put in the same position in which they were at the time they had the various transaction, which the record shows they had in connection with the purchase of this land.

On the other hand, if this decision is permitted to stand, the result will be that the railroad company secured a tract of land for which it received $480 in

cash, without ever having any legal claim or title thereto, and Donovan, the settler, who was entitled to enter the land back in 1868, and was prevented from so doing by the unlawful acts of the officers of the Government, will be deprived, not only of the absolute right which he had under the homestead laws of the United States to enter the land, but in addition thereto will be deprived of his labor upon the land, covering a period of nearly eighteen years, and the money which he expended upon the land at the time of his attempting to enter it, and during the years in which it was in his possession. If this decree of the circuit court is permitted to stand, the wrong done to Donovan can never be righted, and we earnestly maintain that the equities in this case are clearly in favor of Donovan, rather than in favor of the appellees—the Erichsruds and Woodwick.

In the foregoing discussion of the facts relative to the equities in this case we have conceded *arguendo* that the Government is merely a conduit through which one private person can conduct litigation against another private person. But even admitting that this suit is of such a character, we maintain that the circuit court of appeals committed error in holding that the equities were in favor of Woodwick, rather than in favor of Donovan, and that the suit was a proper one for the application of the doctrine of laches.

The circuit court of appeals in its opinion ignored all other questions of law and fact presented by the record, and rested its conclusion upon the principles

of law heretofore discussed. We think that we have shown that this opinion of the circuit court of appeals is erroneous, and should therefore be reversed, unless it should appear that the decision of the circuit court can be sustained upon other questions in the case which were not considered by the circuit court of appeals.

## PART TWO.

Negative errors committed by the circuit court of appeals by its failure to correct the errors committed by the circuit court in its opinion and judgment.

### I.

**The circuit court erred in holding that the lands in the indemnity limits of the grant were withdrawn from market on September 10, 1866, and that the cancellation of Barkley's entry on January 14, 1868, did not restore the 80-acre tract in controversy to market, and subject to entry by the first legal applicant.**

It is well-settled law that where a tract of land in the place or granted limits is subject to a homestead or preemption claim at the date of the grant, it is thereby forever excepted from the grant. (*Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S., 535.)

It is equally well-settled law that land along the indemnity limits of a railroad grant, if subject to a homestead or preemption claim at the time of the grant, which claim is afterwards canceled, that the land then becomes subject to selection by the railroad company or any other legal applicant. (*Ryan* v. *Railroad Co.*, 99 U. S., 382; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496, 511–512; *Hewitt* v. *Schultz*, 180 U. S., 139.)

The error of the court consisted of three erroneous assumptions:

(*a*) The simple allegation in the bill "that an order was made by the Secretary of the Interior withdrawing the lands embraced within the provisions of said act from market on September 10, 1866," was not intended as an allegation extending the withdrawal to anything more than the granted or place lands, and was not intended to convey the idea that an order was issued by the Secretary of the Interior at that time withdrawing the indemnity lands from market and public sale.

(*b*) It is alleged in the bill that the withdrawal was made September 10, 1866. The answer of the defendants, the railway companies, states that the definite location of the road was made and map thereof filed December 10, 1866. (See Rec., p. 15.) Section 5 of the granting act, which must necessarily be the measure of power which the Secretary of the Interior had with respect to the withdrawal of the public lands embraced within its provisions, provides as follows:

> That as soon as the governor of said State shall file or cause to be filed with the Secretary of the Interior, maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act. (14 Stat., 87.)

It is well settled by the land department that where Congress provides for the withdrawal of lands from market, any withdrawal which is contrary to such pro-

vision is absolutely void. (*Northern Pacific Railroad Co.* v. *Davis*, 19 Land Decisions, 87.)

In Atlantic and Pacific Railroad Company (6 Land Decisions, 84), Mr. Secretary Lamar, on page 87, said:

> Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise.

It must be observed, however, in the case at bar, that the Secretary of the Interior more than three months before the line of road was definitely located, and a map thereof filed by the governor of the State of Minnesota with the Secretary of the Interior, that the Secretary of the Interior attempted to withdraw from market the lands embraced within the provisions of this act. Such action on the part of the Secretary was clearly contrary to the provisions of section 5 of the act defining his power with respect to such withdrawal, and such withdrawal was therefore absolutely void.

(*c*) And, finally, it is well settled that where land is subject to a homestead or preemption claim at the date of the passage of a granting act, that such land is excepted from an order withdrawing the lands from market.

In the case of the *St. Paul, Minneapolis and Manitoba Railway Co.* v. *Iverson* (vol. 14, Land Decisions), the

uniform rule prevailing in the Land Department is thus stated:

> Under the uniform rulings of this Department, said filing and entry, being subsisting at the dates said withdrawals became effective, served to except the land embraced therein from the operation of such withdrawals, and the same was thereafter subject to settlement and entry by any qualified person, or selection by either of the companies in the manner prescribed in the regulations governing such selections.

The Commissioner of the General Land Office, in his letter to the Secretary of the Interior, while ruling against the application of Donovan, says with reference to the effect of the withdrawal:

> There can be no question that the land was excepted from the withdrawal. Upon the cancellation of Barkley's entry the tract became subject to selection on account of the grant or to the entry under the preemption or homestead laws by the first legal applicant. (See p. 119 of Record.)

The Secretary of the Interior, in his letter to the Commissioner, referring to the same matter, says:

> The tract in dispute was excepted from the withdrawal for the benefit of said grant by reason of the entry of Barkley, and after the cancellation of his entry the tract became subject to selection by the road, or to entry under the homestead and preemption laws by the first legal applicant. (See p. 121 of Record.)

And it may be further suggested that the joint answer of the railway companies admits that the land

was subject to selection or to entry under the homestead or preemption laws of the United States by the first legal applicant, after the cancellation of the Barkley entry in February, 1868. (See p. 15 of Record.)

There is no claim, either in the pleadings or in the evidence, that the withdrawal order of the Secretary of the Interior of September 10, 1866, operated to prevent a selection by the railroad company or an entry under the homestead or preemption laws of the United States after the cancellation of the Barkley entry. And the decision of the circuit court that such withdrawal took the land out of the reach of a homesteader or preemptor is the first affirmative and manifest error committed by the court below.

Admitting, *arguendo*, not only that the withdrawal order of the Secretary of the Interior was legal, but that it also extended to lands in the indemnity limits, it is quite manifest that the homestead entry of Barkley would except that particular tract of land from the operation of such withdrawal. This assertion is based upon the ground that where a homestead or preemption claim has attached to land, such land is thereby segregated from the public domain, and for the time being is withdrawn from the jurisdiction of the Secretary of the Interior and the land department, and so continues until the entry is canceled. (Ryan case, *supra;* see also *Southern Pacific Railway Company* v. *Bell*, 183 U. S., 675.)

In the recent case of the *Oregon and California Railroad Company* v. *The United States* (189 U. S., 103, 112,

113) this court, after reviewing at considerable length prior decisions in the Federal courts with respect to the power of the Secretary of the Interior to withdraw indemnity lands from public market, made use of the following language:

> Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

See also *O. & C. Ry. Co.* v. *U. S.* (189 U. S., 116).

II.

**The circuit court erred in refusing to hold that Donovan's application to the local land office to enter the land was, under the facts in the case, equivalent to a legal entry.**

It appears from the uncontradicted testimony of Donovan (see pp. 63 to 73, and 88 and 90 of Record), that immediately upon the rejection of his application to enter the land in controversy in June, 1868, he returned to the land and took possession of that tract in section 35 along with the 80-acre tract in section 26, which he had been allowed to enter, and commenced the cultivation of the same and continued in the possession and cultivation of the same without objection or opposition down to the year 1885. In May, 1875, he appeared before the local land office and made final proof of his occupation and cultivation of the 80 acres in section 26, for which he received a

patent, and at the time of making such proof he also offered to prove to the register of the land office his occupation and cultivation of the 80-acre tract in section 35; but the register refused to take such proof upon the ground that he had not been allowed to enter the same. (Rec., p. 70.) Donovan never voluntarily abandoned the land.

From these facts we conclude that Donovan, having performed all the requirements of law with respect to the occupation and cultivation of the land in controversy, so as to entitle him to a certification and patent for the same, he secured a vested interest in the land of which he could not be deprived even by an act of Congress.

It is well settled by repeated decisions that where a party applies to enter, under the homestead or preemption laws of the United States, a tract of land which is subject to be so taken, and he is qualified to thus acquire the same, and his application is erroneously rejected by the Government officials, his right thereto attaches just the same as though his application had been allowed; and if he continues in possession and complies with the law so as to be entitled to a patent, he acquires a vested interest of which he can not be deprived even by an act of Congress.

**Shepley v. Cowan (91 U. S., 330).**

This was a suit to settle conflicting claims of the parties, arising from their respective patents to a fractional section of land, comprising thirty-seven and two-fifths acres, situated in the State of Missouri.

The court says:

> His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if, in point of fact, the reservation had then ceased.

*Ard v. Brandon and Ard v. Price* (156 U. S., 537).

In this case Ard applied to enter as a homestead 240 acres of land, 80 acres of which was in section 2 and 80 acres in section 11, but each adjoining tracts, and could thus be taken as a homestead under sections 2289 and 2290 of the Revised Statutes. It will be observed that this was exactly the situation of Donovan in the case at bar. Ard's application was for land in the State of Kansas, and was rejected upon the ground that the land was within the limits of two railroad grants, one to the Missouri, Kansas and Texas Railway Company and the other to the Leavenworth, Lawrence and Galveston Railroad Company. Ard was told by the local land officers that the minimum price of the land was $2.50 per acre, and that he could preempt 80 acres at the minimum price and afterwards acquire the other 80 acres under the homestead law as an adjoining tract, and advised him to get title in that way, and he accordingly changed his application from a homestead into a preemption filing on the 80-acre tract in section 2. These lands were within the indemnity limits of the grants to the railroad companies, and it appears that indemnity lands could be selected in even as well as in odd

sections. Ard applied to make final proof upon said land in 1872, but his application was rejected upon the ground that all the land belonged to the railroad company. The tract in section 2 had been selected by the Missouri, Kansas and Texas Railway Company in 1870, and patented to that company the same year, and the tract in section 13 had been selected by both companies in 1867 and certified to the State for the Missouri, Kansas and Texas Railway Company in 1873. The defendants, Brandon and Dyer, each claimed title to one of the 80-acre tracts under conveyances from the railroad company, and brought separate actions of ejectment against Ard to recover the possession of the same in the State court, whose judgment was confirmed in their favor against Ard, and the case removed by him to the Supreme Court.

The syllabus of the case is as follows:

> A, being qualified to make a homestead entry, entered in good faith upon public land within the indemnity limits of a railroad grant, but not within the place limits. He forwarded at the local land office the right to enter 160 acres as a homestead. This was refused on the ground that the tract was within the limits of the grant, although at that time the land had not been withdrawn from entry and settlement. This was subsequently done, and the land conveyed to the railway company. A remained upon the land, cultivating it. In an action to recover possession from him, brought here from a State court by writ of error, *held* that the application was wrongfully rejected, and that

his rights under it were not affected by the fact that he took no appeal.

The opinion of the court was delivered by Justice Brewer, and after some preliminary remarks, he says (we put in italics what we wish to call special attention to):

> The question, therefore, is whether the cases disclose equitable rights in the defendant superior to the claims of the railway company. If his rights are only those which spring from his preemption entry and subsequent occupation of the lands, it may well be, as held by the supreme court of the State, that the decisions of the land department upon the question of fact are conclusive against him. But we are of the opinion that the testimony shows a right anterior to his preemption entry—a right of which he was deprived by the wrongful acts of the local land officer, and which he did not forfeit or lose by virtue of his subsequent efforts to preempt the land. According to this testimony he had commenced improving the premises prior to July 14, 1866. He was qualified under the laws of the United States to make a homestead entry. The land was not within the place limits of either road, and had not been withdrawn by the land department from entry and settlement, for the orders of withdrawal were not made until March 19 and April 30, 1867. He had, therefore, on July 14, when he went to the land office, the right to enter the entire 160 acres as a homestead. This right he demanded. He made out a homestead application for the land as described, tendered the application and the

> land-office fees to the register of the land office, but the register rejected the application, giving as a reason therefor that the land was within the granted limits of the Leavenworth, Lawrence and Galveston Railroad, and was double minimum lands, and that 80 acres was the limit of a homestead entry of such lands. As to this matter of fact the register was mistaken, and his rejection of the application was wrongful, and denied to defendant that homestead entry which, under the law, he was then entitled to. In the case of *Shepley* v. *Cowan* (91 U. S., 330, 338), this court said, after referring to the cases of *Frisbie* v. *Whitney* (9 Wall., 187), and the *Yosemite Valley Case* (15 Wall., 77).

After quoting from the case of *Shepley* v. *Cowan*, the court further proceeds as follows:

> Within the authority of that case we think the defendant has shown an equity prior to all claims of the railway company. He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made out a formal application for the entry, and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them—and wrongfully rejected by him. ***Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith goes upon the public lands, with a view of making***

*a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.*

The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person. (*Clements* v. *Warner*, 24 How., 394, 397.)

In regard to the fact that Ard did not appeal from the refusal of the local land officers to allow his homestead entry, the court says:

Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost.

The decision of the State court was reversed and the land given to Ard.

This case has been referred to and approved in several subsequent decisions, and is a recognized leading

authority to the point that where an application to enter or preempt land which is subject to be so taken, by a party duly qualified, is erroneously rejected, the rights of the applicant attach and become fixed just as effectually as if the application had been allowed.

**Weeks v. Bridgman (159 U. S., 541).**

This is a case where a man by the name of Brott applied to enter a section of land under the preemption laws, which in point of fact he had a right to so enter, but the local land officers rejected his application upon the ground that the land belonged to a railroad grant for the railroad from St. Anthony to St. Cloud. Brott appealed to the Land Commissioner and to the Secretary of the Interior, which latter officer decided in favor of his right to preempt the land. In considering the question as to the effect of his application to preempt and its rejection, the court says:

> The line of the road was definitely fixed December 30, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain; and the grant took effect thereon. But under the granting act, lands to which preemption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. *And this was true in respect of applications for preemption rejected by the local land office* and pending on appeal in the land department at the time of definite location, since the

initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the Government and the claimant. (*Railway Company* v. *Dunmeyer*, 113 U. S., 629; *Railroad Company* v. *Whitney*, 132 U. S., 357; *Bardon* v. *Railroad Company*, 145 U. S., 535; *Ard* v. *Brandon*, 156 U. S., 537; *Whitney* v. *Taylor*, 158 U. S., 85.) Brott selected certain lands, including this in dispute, for and built and established his mail stations thereon in 1855 and maintained the same during the term of his mail contract, and filed his application to enter these lands as a mail contractor under the act of March 3, 1855, in the local land office August 11, 1857. The application was rejected by the local land officers, and Brott appealed to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, who reversed the rulings of the land officers and of the Commissioner, and held Brott entitled to preempt the stations occupied. *He was, indeed, required to produce proof of the performance of his mail contract and of the occupation of the lands as stations*, and he actually entered them in pursuance of the act of Congress for his relief, *but in Ard* v. *Brandon, supra, it was held that when a preemptor has the right to make entry and applies to the local land officers and they refuse to recognize his right, it will be deemed to date from the time of his application, and this notwithstanding he proceeds to obtain title in some other way.* The conclusion follows that Brott's preemption claim must be regarded as having

attached prior to the definite location, December 30, 1857, and that the title did not pass under the Congressional grant to the State.

But Brott did not pursue his preemption application or acquire title under the same, but procured an act of Congress authorizing him to preempt the same, and that he did, and obtained a patent in 1871. In the meantime, however, the land had been certified to the State as appertaining to the railroad grant and had been conveyed by the State to the railroad company. Therefore Brott could not claim title as against the railroad company under the act of Congress giving him the right to preempt the same, as that was subsequent to the date when the rights of the railroad company would attach, unless his application to preempt excepted the land from the operations of the grant. The court held that it did, and therefore that the certification of the land to the State and the conveyance by the State to the railroad company passed no title as against the rights of Brott, and that although Brott did not get a patent under his preemption application, yet having obtained the patent in fact, although subsequent to the conveyance of the land to the railroad company, it gave Brott the better title. The defendant in the action claimed title under Brott and the plaintiff in the action claimed title under the railroad company. *The case affirms the doctrine* that *an application to enter or preempt land, if erroneously rejected, secures to the applicant the same rights as if allowed.*

That was a case where a man by the name of Olney had settled upon a tract of land in Utah with the view of acquiring title under the land laws of the United States in 1868, but at that time there was no local land office where he could file his application, but in 1869, and soon after such an office was established, filed his preemption application and dated the same at the date of such filing instead of the date of his settlement upon the land, and made no reference to the fact of his settlement upon the land prior to the date of such filing. But before the date of said filing the Central Pacific Railroad Company had located the line of its road through that region and the Olney land fell within the limits of a grant by Congress for that road. The date of Olney's actual filing was therefore subsequent to the date when the rights of the company would attach by the location of its road. Olney, however, abandoned his claim, and the land was conveyed to the railroad company under the grant. Many years thereafter another party settled upon and filed a preemption claim to the land, claiming that the land was excepted from the grant by virtue of the settlement of Olney upon it before the location of the road, and his application was allowed, under which he finally obtained a patent. The land was also patented to the railroad company. The supreme court of Utah decided in favor of the party holding under the preemption claim, but this court reversed that decision, holding that the record showed

the Olney entry to be subsequent to the location of the road and that oral evidence was not admissible to show an earlier entry by Olney upon the land. In considering the effect of an entry upon land without actual filing in the land office, the court say:

> It is true that there was then no local land office in which those seeking to make preemption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the supreme court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or preemption entry, can not be defeated by the mere lack of a place in which to make a record of his intent.
>
> Where the accident or omission is not the fault of the party, but of the Government or some official of the Government, such accident or omission can not defeat the right of the individual, and in all that is said in respect to this by the supreme court of the State of Utah we fully agree.
>
> And in this respect we must notice the oft-repeated declaration of this court that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." (*Ard* v. *Brandon*, 156 U. S., 537, 543; *Northern Pacific Railroad* v. *Amacker*, 175 U. S., 564, 567.) With this declaration in

all its fullness we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims, every intendment should be in his favor in order to perfect the title which he was seeking to acquire.

**Goodale v. Olney (12 Land Decisions, 324).**

It is also the well-settled rule of the *land department* that an application to enter or preempt land which is erroneously rejected secures to the applicant the same rights as if his application had been allowed.

The Secretary of the Interior, in *Goodale* v. *Olney*, held that:

> An application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending reserves the land from any other disposition. An applicant for the right of entry is not required to reside on the land embraced within his application pending the decision thereon. (See also *Duluth and Iron Range R. R. Co.* v. *Roy*, 173 U. S., 587.)

And in *Coder* v. *Lotridge* (p. 643), same volume, the Secretary also held in the same words that:

> An application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending reserves the land from any other disposition.

## III.

**As Donovan had complied with all the requirements of the law, including payment for the land, to entitle him to a certificate and patent for the same, he thereby acquired a vested interest in the land of which he could not be deprived by any act of Congress.**

Now, while it is the settled rule of law that a mere homestead entry or preemption filing does not secure to the party any rights as against the power of the United States to make other disposition of the same, yet it is equally well settled that where the party has fully complied with the law so as to become entitled to a certificate of entry and a patent for the land, *he thereby acquires a vested interest* in the land, of which he can not be deprived by Congress or otherwise without his consent. Thus in the case of *Gonzales* v. *French*, (164 U. S., 338, 346), the Supreme Court, after stating the rule that a mere preemption filing or homestead entry does not give to the party a vested right in the land as against the power of the United States to make other disposition of it, says:

> That the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all *the preliminary* acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. *When these prerequisites were complied with, the settler for the first time acquired a vested right in the premises of which he could not be subsequently deprived.* He was then entitled to a certificate of entry

> from the local land officers, and ultimately to a patent of the United States.

Donovan had performed all the preliminary acts required by law, including payment for the land, for the acquisition of the title. On compliance with these preliminary acts he for the first time acquired a vested right in the premises of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers and ultimately to a patent of the United States.

It is well settled that where a party has paid for the land and has complied with the law for the acquisition of the same he thereby becomes the absolute owner, and may deal with the same as his own, and the same is subject to taxation, although he may not have received his patent therefor. In such case the Government merely holds the legal title in trust for him. (*Carroll* v. *Safford*, 3 How., 441; *Astrom* v. *Hammond*, 3 McLean, 108; *Carroll* v. *Perry*, 4 McLean, 26; *Ross* v. *Supervisors, etc.*, 12 Wis., 38; *People* v. *Shearer*, 30 Cal., 645.)

**Newkirk v. Marshall, Kas. (vol. 10, Pacific Rep., 571).**

In that case it was held that a homestead entryman who had occupied and cultivated the land as required by law for five years acquired a *vested interest in the same*. Upon this subject the court says:

> Under the facts of this case we do not think that the plaintiff can maintain her action. Under the United States homestead laws, and by

a compliance with them, a person entering a homestead, or in case of his death his widow, or in case of the death of both his heirs or devisee, *obtains a vested right in the homestead at the expiration of five years from the entry thereof*, and upon making proper proof is entitled to a patent for the land from the United States. And as soon as a person is entitled to a patent, although it may not yet have been issued, and may not be issued for years, he or she may contract and be contracted with concerning the land, or sell it, or convey the same, precisely the same as though the patent had already been issued. Equity, in order to do justice and to protect the rights of parties and to prevent frauds, will generally consider that as having been done which ought to be done. And in order to protect the rights of all parties where a patent is due, but has not yet been issued, equity will consider such rights precisely the same as though the patent had in fact been issued on the very first day on which it ought to have been issued.

That an entryman acquires a vested interest in the land when he has fully complied with the requirements of the law was recognized in the case of *Hawley* v. *Diller* (178 U. S., 476), where the court, on page 490, after a lengthy review of the authorities, concludes as follows:

> We are of opinion that the result of the decisions of this court was correctly stated by Judge Hawley when, speaking for the United States circuit court of appeals in *American Mortgage Co.* v. *Hopper* (29 U. S. App., 12, 17), he

said: (1) That the land department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) *that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law;* (3) that the land department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee, and (4) that redress can always be had in the courts where the officers of the land department have withheld from a preemptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision.

Now, Donovan duly applied to enter the land in June, 1868, in connection with an adjoining 80-acre tract in section 26, and paid the price thereof, but his application to enter the tract in question in section 35 was erroneously rejected. He, however, continued to occupy, cultivate, and improve the tract of land in question for five years without opposition, and in 1875, after having so occupied and cultivated the same for five years, and having fully complied with the law in that respect, at the time of making final proof in respect to the 80-acre tract in section 26, he also offered proof of his occupation and cultivation of the tract of land in question, as required by law, but such proof was re-

jected and refused to be taken by the local land officers upon the ground that he had not been allowed to enter said tract. He, therefore, had done everything that the law required of him to do in order to acquire a title under the homestead laws to said tract of land in question. *He had duly applied to enter it and had paid the price of the land at that time, and had occupied and cultivated it for five years, and offered to make final proof, as required by law. He, therefore, then became entitled to a certificate of entry and to a patent to the land. He had acquired a vested interest in the land of which he could not be deprived.*

## PART THREE.

### THE PRECISE QUESTION OF LAW UPON WHICH THIS CASE MUST BE DECIDED.

In the first part of our argument we have endeavored to show that the circuit court of appeals based its decision in this case upon principles of law which had no application to the facts here presented, and as a necessary result the reasons which that court assigned for its decision are unsound. In the next place we have endeavored to point out certain errors committed by the circuit court with a view to showing that the reasons assigned by that court for its decision are based upon erroneous conceptions of the law. We will now endeavor to indicate what we conceive to be the vital and pivotal point at issue in this case, and the solution of which must determine the respective rights of the parties to this controversy.

### THE PRECISE QUESTION OF LAW PRESENTED.

**If the United States had the legal title to this land in 1871 when it certified the same to the State of Minnesota, and at the same time had also jurisdiction to convey such legal title to the State, and thereafter Louis K. Woodwick acquired such legal title as a bona fide purchaser, (which would be, of course, without notice, actual or constructive, of Donovan's equities and interest in the land), then, and in such case, neither the United States nor Donovan could recover the land, for the reason that the law protects the bona fide purchaser.**

It will be observed that this proposition concedes two points, neither of which the Government is pre-

pared to concede. In the first place the United States must have occupied such a position with respect to the title to this land in 1871, that its officers in the Interior Department had jurisdiction to convey *the legal title.* If Donovan's settlement upon the land, and having cultivated it for three years prior to 1871 with the intention of claiming it under the homestead laws of the United States, operated to divest the Interior Department of jurisdiction to certify such land to the railroad company, then of course the legal title never passed to the railroad company, although they received a patent, which was, as this court has so often said, merely evidence of the legal title. But even though the legal title passed by the certification, Donovan still held the equitable title by reason of his occupancy and cultivation of the land, and he retained such title as against the railroad company and all other parties purchasing from the railroad company or its grantees with knowledge, actual or constructive, of Donovan's equitable right to the land. In other words, in order to divest Donovan of his claim to the equitable title to the land, and of the Government of its right to cancel the patent, it was necessary for some third party to acquire from the railroad company the legal title for a valuable consideration, in good faith and without notice, of Donovan's equities.

Manifestly, nobody could acquire such title while Donovan was in possession, for possession itself was notice to the purchaser. When Thompson dispossessed Donovan in 1885, and went into possession and conducted the litigation which lasted until 1888, both the

United States and Donovan were in a position to assert their rights with respect to this land as against the railroad company and as against Thompson, for the reason that each had notice of Donovan's claim and of his equities in the land.

If it should be determined that the legal title to this land passed to the State of Minnesota in 1871, the next important question for determination is whether Louis K. Woodwick, the present holder, purchased the property from the Erichsrud heirs without notice, either actual or constructive, of the pendency of the suit between the United States and the railroad company involving the question of title to this land. If Woodwick bought the land as a *bona fide* purchaser in 1899, and acquired the legal title to the same, it must be conceded that at that precise time not only was the right of the United States to recover the land defeated, but Mr. Donovan was precluded from thereafter asserting his claim to the land as against such *bona fide* purchaser.

It will, therefore, be seen that, without any reference to the act of March 3, 1887, or the act of March 2, 1896, the rights of the several parties to this controversy were finally settled and determined at the time of the Woodwick purchase in 1899.

The Government, therefore, in order to prevail in this suit, must establish either one of two propositions: *First*, that the legal title to the land never passed to the railroad company from the Government by the certification in 1871; or, *second*, that Louis K. Woodwick was not a *bona fide* purchaser of the land in 1899,

and took his title with notice of Donovan's claim and the other irregularities in connection with the certification to the railroad company. It is manifest that if either one of these two propositions be established, the Government or Donovan would be entitled to maintain a suit for the recovery of this land against Woodwick, for the reason that he either never acquired the legal title to the land or had notice of Donovan's claim.

(a)

**Did the administrative officers of the Interior Department have the power in 1871 to convey by certification to the railroad company the legal title to the land in controversy?**

This question suggests to the mind two matters for investigation: First, did the United States Government have the legal title to this 80-acre tract of land, so that its officers could convey title, after Donovan had resided upon it and cultivated it, with the intention of claiming it as his homestead, for a period of more than three years? That is to say, had not a qualified or initiatory title passed from the United States to Donovan, so as to prevent the ministerial officers of the Government from passing title to some one else, and so as to render their attempted acts in that regard absolutely void? Second, if the United States in 1871 still retained title in itself, notwithstanding Donovan's occupation and cultivation of the land, did not such occupation and cultivation withdraw the land from the jurisdiction of the Land Department, so far as issuing a certification was concerned to the railroad company,

just as effectually as though the land had been reserved or otherwise appropriated specifically by an act of Congress?

The solution of these two questions will determine whether or not the railroad company obtained the legal title to the land in 1871 by and through the certification to the State of Minnesota, and if so, then, and in such case, the railroad company could, of course, convey the legal title to a purchaser, and the remaining question would be as to whether such purchaser bought with notice of the defects in the company's title.

**Donovan's entry and occupation of the lands in controversy and cultivation of the same up to 1871, with the purpose of entering the same as his homestead had the legal effect of so withdrawing such lands from the control of the Land Department that the officers thereof had no authority to issue a certification to the State of Minnesota, and their acts in so doing with respect to this tract of land were void.**

**Doolan v. Carr (125 U. S., 618, 624).**

Mr. Justice Miller, in delivering the opinion of the court in this case, clearly pointed out when the acts of the officers of the Government in issuing patents were void and when merely voidable. He said:

> There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from

suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has often been asserted in this court, that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. *Polk's Lessee* v. *Wendall*, 9 Cranch, 87; *New Orleans* v. *United States*, 10 Pet., 662, 730; *Wilcox* v. *Jackson, dem. McConnell*, 13 Pet., 498, 509; *Stoddard* v. *Chambers*, 2 How., 284, 317; *Easton* v. *Salisbury*, 21 How., 426, 428; *Reichart* v. *Felps*, 6 Wall., 160; *Best* v. *Polk*, 18 Wall., 112, 117; *Leavenworth*

*Railroad* v. *United States*, 92 U. S., 733; *Newhall* v. *Sanger*, 92 U. S., 761; *Sherman* v. *Buick*, 93 U. S., 209; *Smelting Co.* v. *Kemp*, 104 U. S., 636; *Steel* v. *Smelting Co.*, 106 U. S., 447; *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S., 629, 642; *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687.

From the foregoing case it is apparent that in those cases where the United States parts with the legal title to land, or where the land has been reserved or otherwise appropriated by Congress, the officers of the land department have no longer any jurisdiction with reference to the subject-matter, and if thereafter they should attempt to issue a patent or certification for any such lands, their acts would be absolute nullities.

The precise question here is whether Donovan's occupation, improvement, and cultivation of this 80-acre tract in section 35 for a period of three years, and his application to enter the same at the local land office as his homestead, operated to withdraw this tract of land from the control of the Secretary of the Interior, so that he was without jurisdiction to issue a certification covering the same to the railroad company in the year 1871.

It has been decided frequently by this court that a patent is but evidence of a grant, and that the officer who issues the same acts ministerially and not judicially. (*United States* v. *Stone*, 69 U. S., 525; *Hawley* v. *Diller*, 178 U. S., 476; *Newkirk* v. *Marshall*, 10 Pacific Rep., 571.)

It has also been decided by this court that under

the Federal laws relating to homesteads, when a person qualified to make a homestead entry goes upon the public domain in good faith, with the purpose of settling thereon and acquiring a homestead under the laws of the United States, his right to the lands so entered attaches as at the time of his settlement, and that such right from that time gradually, day by day, ripens into a perfect title, so that at the end of five years, if he has fully complied with the laws of Congress relative to occupation and cultivation, he becomes invested with the absolute title to the land, although no patent may have issued to him, and a patent or evidence of his title may not be issued to him by the officers of the Government for many years thereafter.

This being true, the question naturally presents itself as to the time when the title to the land passes from the United States to the homesteader. To illustrate: Suppose that the certification to the railroad company in this case had not been made until 1876, after Donovan had been in possession of the land and cultivated the same for a period of more than five years, would it not be clear that Donovan had acquired not only a vested interest in the land, but that the title to the land, both legal and equitable, had passed from the United States to Donovan after he had been on the land for a period of five years? It would be true that the patent, which is the evidence of title, would still be unissued, and might be thereafter issued by the ministerial officers of the Government to the railroad company or some other party not

entitled to the same; but such issuance of the evidence of title would have no effect to convey even the legal title to such patentee. We therefore submit that, upon the settlement and occupation of the land by Donovan, with the purpose of acquiring the same as a homestead, not only was the title of the United States to said land so impaired as to prevent the United States from conveying the legal title thereto to the railroad company, but that such lands were also withdrawn from the jurisdiction of the Land Department as to prevent its officers from conveying the legal title thereto, and that their ministerial acts in issuing the patent or certification to the railroad company were absolutely void.

**Burr v. Greeley (52 Fed. Rep., 926).**

In considering this matter the circuit court of appeals for the eighth circuit, in *Burr* v. *Greeley*, speaking through Judge Caldwell, said:

> In the case of *Railway Company* v. *Dunmeyer* (113 U.S., 629) 5 Sup. Ct. Rep. 566, the Supreme Court decided that under the act of July 1, 1862, and the acts amendatory thereof, granting lands to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean (12 Stat., 489), lands to which a preemption or homestead claim had attached at any time before the line of the road was definitely fixed by filing a map of its location with the Commissioner of the General Land Office at Washington were exempted from the operation

of the grant, and that the failure of the preemptor or homesteader to make the requisite proof and perfect his claim, or its actual abandonment, did not cause the lands to revert to the railway company or become a part of the grant, but in such case it remained a part of the public domain. Before this decision was pronounced the Government had issued patents or patent certificates to the railway company for lands which were not within the grant, because preemption and homestead rights had attached thereto before the company filed the map of the definite location of its road in the General Land Office. In some instances the company had sold and conveyed such lands.

After the decision in the Dunmeyer case it was plain that as to all lands to which the right of premption or homestead had attached prior to the definite location of the line of railroad the patents issued by the Government to the railway company were void. (*Railway Company* v. *Dunmeyer, supra; Smelting Company* v. *Kemp*, 104 U. S., 646, 647; *Steel* v. *Refining Company*, 106 U. S., 452, 453; *Wilcox* v. *Jackson*, 13 Pet., 498; *Best* v. *Polk*, 18 Wall., 112; *Doolan* v. *Carr*, 125 U. S., 618.) It was equally plain that the purchasers from the railway company of such lands acquired no title.

**Weeks v. Bridgman (159 U. S., 541).**

In this case a man by the name of Brott had applied to preempt a tract of land, but his application was erroneously rejected upon the ground that the land belonged to a railroad grant, and the land was afterwards conveyed

to the railroad company as a part of its grant, and by the company sold to a *bona fide* purchaser. Brott long afterwards obtained a patent for the land under a special act of Congress and conveyed the land to another party. A question arose as to who had the better title, the party claiming under the railroad company or the party claiming under Brott. It was held that the party claiming under Brott had a better title because Brott's title was initiated at the time of his application to enter, and that the conveyance to the railroad company was void and passed no title. On page 517 the court said:

> As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the preemption right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual. (*Noble* v. *Railroad Co.*, 147 U. S., 165, 174.)

**Gertgens v. O'Connor (191 U. S., 237).**

The Supreme Court in rendering its decision in this case said:

> There were three parties whose interests and equities were to be regarded: First, the railway company, the beneficiary of the grant; second, parties who had dealt with the railway company in reference to lands claimed by it to be within the scope of its grant; and, third, parties who had attempted to secure title under the settlement laws of the United States.

The court, after stating the purposes of Congress with reference to the railroad company and the rights of all *bona fide* purchasers from the railroad company under the act of 1887, further states:

> The third party is the settler under the land laws, and we pass to consider his status and rights. A settler is, as has often been said, favored in law, but it does not follow therefrom that he is the only one whose equities are to be considered. Congress, by section 5, made provision for his protection—such provision as it deemed sufficient. While it gave to purchasers from the railway company a preferential right of purchase, it excepted therefrom lands which at the times of such purchase "were in the *bona fide* occupation of adverse claimants under the preemption or homestead laws of the United States and whose claims and occupation have not since been voluntarily abandoned." In other words, it said that no purchaser from the railway company should have a preferential right of purchasing any lands which at the time of his dealings with the railway company were in the hands of a *bona fide* settler under the laws of the United States, unless such settler should voluntarily abandon his settlement. As between a purchaser from the railway company and a settler on the lands, the settler was given the prior right. But the defendant was not a settler at the time of Ireland's contract, nor, indeed, until many years thereafter.

Upon the authority of the foregoing cases we assert that none of the defendants in the case at bar can base

any valid claim to the land in controversy upon the ground of their being bona fide purchasers, for the reason that they never acquired the legal title to the land. The land was clearly excepted from the grant and thereby taken out of the jurisdiction of the Secretary of the Interior. So far as the right of the Secretary to convey to the railroad company was concerned, and his certification of the land as a part of the grant, was without authority and absolutely void and conveyed no title, and of course no one claiming under the certification could or did acquire any title.

(b)

**Was Louis K. Woodwick a bona fide purchaser? If so, neither the Government nor Donovan could maintain a suit to dispossess him, and this would be true, even in the absence of the acts of Congress of 1887 and 1896.**

**United States v. Winona and St. Peter Railroad Co. (165 U. S., 463, 478).**

In this case the court clearly recognizes that a *bona fide* purchaser is fully protected in a suit against the Government, even in the absence of a statute. The court said:

> Further, there was no need of any legislation to protect a "bona fide purchaser." This had been settled by repeated decisions of this court. *United States* v. *Burlington and Missouri River Railroad Company*, 98 U. S., 334, 342; *Colorado Coal Company* v. *United States*, 123 U. S., 307, 313—reaffirmed in *United States* v. *California, &c., Land Company*, 148 U. S., 31, 41. For

in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the Government, if the land conveyed was within the jurisdiction of the land department, the title of a bona fide purchaser from the patentee could not be disturbed by the Goverment, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the Government is all that was intended by Congress.

**Colorado Coal and Iron Co. v. United States (123 U. S., 307, 313).**

Mr. Justice Matthews, after stating the facts, in delivering the opinion of the court, said:

> It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity *as against the parties perpetrating it, or those claiming under them with notice of it*, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value without notice is perfect.

On the authority of these two cases it must be conceded by the Government that if Louis K. Woodwick was a *bona fide* purchaser the decree of the circuit

court was for the right party, although the reasons assigned by the court in support of such decree may have been unsound. If this court should hold that the legal title to this land passed by the certification to the State, then the issue as to whether Woodwick was a *bona fide* purchaser in its final analysis comes down to this question, and this alone;—Was the pendency of the suit involving the title to this land sufficient to charge Woodwick with constructive notice of the defective title which he purchased?

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Chancellor Kent, in the leading case of *Murray* v. *Ballou* (1st Johns., 565, decided in 1815), announced the rule of law which had been recognized in England for more than two hundred years as to when a purchaser of land is chargeable with constructive notice so as to render his purchase subject to the event of the suit. The rule is as follows:

> The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.

This rule is supported by ample authority both in England and America, and there seems to be no deviation from that portion of the rule which holds that the *lis pendens* begins to run from the service of the subpœna after the bill is filed.

The record in this case shows conclusively that no subpœna was served upon O. C. Erichsrud, or any of his heirs, nor upon Louis K. Woodwick, until 1901, some two years after he purchased this property from

the Erichsrud heirs. With these facts of record, it is futile to maintain that Louis K. Woodwick had constructive notice of the defects in his title by reason of the pendency of the suit which had been instituted by the Government in 1893, and in which the railroad companies alone had been served with process.

### IN CONCLUSION.

We have earnestly maintained in the argument of this case that the acts of Congress of 1887 and 1896 have no direct bearing upon the real question of law here presented and upon which this case turns. In order, however, to avoid confusion and misunderstanding as to just what is meant by a *bona fide* purchaser, it becomes necessary to point out that a *bona fide* purchaser from the railroad company in the case at bar, where the prior interest of a homesteader must be considered, is very different from the *bona fide* purchaser referred to in the act of Congress of 1896, as that law has been interpreted and construed by this court.

**United States v. Winona and St. Peter R. R. Co. (165 U. S., 463, 481).**

In this case it must be remembered that all homestead entries and preemption filings had been duly canceled by the General Land Office, after proper notice by publication—generally on the ground of abandonment—prior to the certification of the lands to the State of Minnesota for the benefit of the railroad company. This court, therefore, with this point in view, viz, that it was a matter between the United

States, the railroad company, and the purchaser in good faith from the railroad company, the rights of homesteaders and preemptors having been eliminated, adopted a liberal construction of the phrase "bona fide purchaser" as used in the act of Congress of 1896.

The court said:

> These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, *if not in the fullest sense a "bona fide purchaser,"* has nevertheless purchased in good faith from the railroad company.
>
> * * * * *
>
> Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, *and free from individual or other claims.*

In the case at bar, however, if Donovan had a vested interest in the land, the act of Congress of 1896 would be ineffectual, as we have seen, to confirm title of a *bona fide* purchaser from the railroad company, unless

such purchaser was "in the fullest sense a *bona fide* purchaser," in which case such a law would have been unnecessary, for the reason, as we have heretofore shown by the decisions of this court, that a *bona fide* purchaser "in the fullest sense of that term" is protected in his property rights without the aid of an act of Congress.

We assert, therefore, that it will not be sufficient for this court to say that if Louis K. Woodwick was a *bona fide* purchaser from the railroad company, as that phrase has been defined by this court in the case of the *United States* v. *Winona and St. Peter Railroad Company* (*supra*), then, under the law of 1896, his title must stand confirmed. The law of 1896 relative to *bona fide* purchasers has no application to a case such as we are here considering, and the liberal definition of a *bona fide* purchaser, which has been given by this court in the interpretation of that statute, must necessarily be disregarded and the strict legal definition of a "bona fide" purchaser adopted when we consider those cases wherein the prior rights of homestead settlers have attached.

In the recent case of *Gertgens* v. *O'Connor* (191 U. S., 237, 246) Mr. Justice Brewer, in delivering the opinion, had the following to say with reference to the prior rights of the settlers, as between the railroad company and a purchaser from the railroad company:

> In other words, it (section 5 of the act of 1887) said that no purchaser from the railway company should have a preferential right of purchasing any lands which at the time of his

dealings with the railway company were in the hands of a *bona fide* settler under the laws of the United States, unless such settler should voluntarily abandon his settlement. As between a purchaser from the railway company and a settler on the lands, the settler was given the prior right. But the defendant was not a settler at the time of Ireland's contract, nor, indeed, until many years thereafter.

Respectfully submitted.

MILTON D. PURDY,
*Assistant Attorney-General.*

# APPENDIX.

## THE FACTS IN THE CASE ARRANGED IN THEIR CHRONOLOGICAL ORDER.

*1866, June 21.*—Luman Barkley duly entered the E. ½, N. W. ¼, sec. 35, T. 101, R. 28 W. as a homestead. (Rec., p. 118.)

*1866, July 4.*—Congress made a grant of land to the State of Minnesota to aid in the construction of a railroad in the southern part of the State. (Rec., p. 118.)

*1866, August 23.*—The Department of the Interior ordered the withdrawal of lands on account of the grant along the company's right of way. (Rec., p. 118.)

*1866, September 10.*—Said order of withdrawal issued by the land department was received at the local land office. (Rec., p. 118.)

*1867,* ———.—Luman Barkley went to Canada and never again returned to Minnesota. (Rec., p. 64.)

*1867, February 25.*—The State of Minnesota turned over to the Southern Minnesota Railroad Company the grant of land received from Congress under the act of July 4, 1866. (Rec., p. 2.)

*1867, July 6.*—Donovan applied at the local land office to enter the land in controversy, and was informed that he would have to submit proof that Barkley had abandoned the land. (Rec., p. 64.)

*1867, August.*—Michael Donovan, having contested Barkley's homestead entry on the ground of abandonment, filed proof of same in the local land office. (Rec., pp. 65 and 66.)

*1868, January 14.*—The Barkley entry was duly canceled by the land department of the Government. (Rec., p. 121.)

*1868, June 6.*—Michael Donovan applied to the local land office to enter the tract as a part of his homestead, but was not permitted to do so. (Rec., p. 88.)

*1870, November 29.*—The Southern Minnesota Railroad Company selected the 80-acre tract of land in controversy. (Rec., p. 3.)

*1871, March 25.*—The land department certified said land to the State of Minnesota for the benefit of said railroad company. (Rec., p. 3.)

*1871, August 8.*—The State of Minnesota conveyed said land to the railroad company. (Rec., p. 4.)

*1875, June.*—Donovan made final proof of occupation and cultivation of the 80-acre tract in section 26, and at the same time offered to make proof of the 80-acre tract in section 35. (Rec., p. 69.)

*1877, February 10.*—This land was sold under a mortgage foreclosure to Mann and Camman. (Rec., p. 19.)

*1877, March 3.*—Said land was conveyed by Mann and Camman to the Southern Minnesota Railway Company. (Rec., p. 20.)

*1883, June 28.*—Donovan duly applied at the local land office to enter as an adjoining farm homestead, said tract of land in section 35, which application was rejected on the ground that the land applied for had already been certified to the State

of Minnesota for said railroad company, from which refusal Donovan duly appealed to the General Land Office, where said matter is still pending undetermined. (Rec., p. 4.)

*1885, January 6.*—The railway company entered into a contract with one A. Boysen for the sale of said land, which contract on the following day was assigned to one N. C. Fredericksen. (Rec., p. 4.)

*1885, April 1.*—Contract assigned by Fredericksen to Thomas Thompson. (Rec., p. 4.)

*1885, April 1.*—Thomas Thompson forcibly took possession of said tract of land, under his contract with the railroad company, and Donovan has been excluded from possession ever since that time. (Rec., p. 4.)

*1885,* ———.—Donovan brought suit against Thompson in the district court to regain possession of the tract.

*1887, March 3.*—Act of Congress passed requiring the Secretary of the Interior to adjust all railroad land grants. (24 Stat., 556.)

*1887, March 24.*—Said court decided that Donovan had no title to the land and awarded possession of the same to Thompson. (Rec., p. 116.)

*1888, January 4.*—Judgment was entered in said cause in favor of Thompson. (Rec., p. 185.)

*1888, February 3.*—Contract assigned by Thomas Thompson to O. C. Erichsrud. (Rec., p. 31.)

*1888, March 20.*—Warranty deed from the railroad company to O. C. Erichsrud. (Rec., p. 171.)

*1888, March 27.*—O. C. Erichsrud died intestate. (Rec., p. 140.)

*1888, April 20.*—Donovan files petition at the General Land Office for the institution of proceedings

under the act of March 3, 1887, to restore to the United States the title to the land in controversy. (Rec., p. 118.)

*1889, February 14.*—The Commissioner of the General Land Office decided that the facts alleged by Donovan were not sufficient to warrant the institution of proceedings to restore title under the act of March 3, 1887. (Rec., p. 118.)

*1889, April 1.*—The Secretary of the Interior reversed the decision of the Commissioner of the General Land Office and ordered the Commissioner to make demand upon the railroad company for the reconveyance of the land. (Rec., p. 120.)

*1890, April 16.*—The Secretary of the Interior transmitted the papers to the Attorney-General, requesting the institution of proceedings under the act of March 3, 1887, to restore the land in controversy to the United States. (Rec., p. 128.)

*1893, March 6.*—The United States exhibited its original bill of complaint. (Rec., p. 1.)

*1894, June 20.*—The United States filed an amended bill of complaint. (Rec., p. 9.)

*1894, August 11.*—The railroad companies answer. (Rec., p. 13.)

*1896, March 2.*—Act of Congress passed limiting time for such suits and confirming title in bona fide purchasers. (29 Stat., p. 2.)

*1898, November 7.*—The land in controversy was decreed by the probate court of Faribault County to the heirs at law of O. C. Erichsrud. (Rec., p. 178.)

*1899, May 24.*—These heirs at law conveyed the land to the defendant Louis K. Woodwick for the sum of $2,000. (Rec., p. 169.)

*1901, March 4.*—A supplemental bill of complaint was filed by the United States. Thompson and

Erichsrud not having been served, the heirs of Erichsrud were made parties. (Rec., p. 11.)

*1901, May 2.*—Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly Erichsrud), Julia P. Remington (formerly Erichsrud), and Louis K. Woodwick, answered the bill and supplemental bill. (Rec., p. 39.)

*1902, January 13.*—The special examiner submitted to the court his report of the testimony taken in the suit. (Rec., p. 195.)

*1902, March 3.*—Opinion of circuit court filed dismissing the bill. (Rec., p. 200.)

*1903, June 16.*—Opinion of the circuit court of appeals for the eighth circuit filed, affirming the decision of the circuit court. (Rec., p. 214.)

**THE LAND-GRANT ACT OF JULY 4, 1866. (14 STAT., 87.)**

CHAP. CLXVIII.—An act making an additional grant of lands to the State of Minnesota, in alternate sections, to aid in the construction of railroads in said State.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in the county of Houston, through the counties of Fillmore, Mower, Freeborn, and Faribault, to the western boundary of the State, and also for a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the State as the legislature of the State may determine, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United

States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses aforesaid: *Provided*, That the land so selected shall in no case be located more than twenty miles from the lines of said road: *And provided further*, That no land shall be granted or transferred by the provisions of this act not included within the jurisdiction of the State of Minnesota: *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operations of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, provided the United States has yet in possession the title thereto.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid: *Provided*, That actual bona fide settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation as now provided by law, purchase the same at the increased minimum price: *And provided also*, That settlers under the provisions of the homestead law who shall make entries after the passage of this act, upon the sections numbered by even numbers, and who comply with the terms and requirements of said act shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That the lands hereby granted shall be subject to the disposal of the legislature of Minnesota for the purposes aforesaid and no other; and the said railroad shall be and remain public highways for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge, and expense in all respects of the company or corporation, or their successors or assigns, having or receiving the benefit of the land grants herein made.

SEC. 4. *And be it further enacted*, That the lands hereby granted shall be disposed of by said State for

the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed, in a good, substantial, and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for all the lands in alternate sections, or parts of sections, designated by odd numbers, situated within twenty miles of the road so completed and lying coterminous to said completed section of ten miles, and not exceeding one hundred sections, for the benefit of the road having completed the ten consecutive miles as aforesaid: *Provided, however*, That the coterminous principle hereby applied shall not extend to such lands as are taken by the said railroad companies to make up deficiencies, provided that no land to make up such deficiencies shall be taken at any point within ten miles upon each side of the line of said roads. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner for a like number; and when certificates of the completion of additional sections of ten consecutive miles of said roads are from time to time made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid, and none other: *Provided*, That if said roads are not completed within ten years from the acceptance of this grant, the said lands hereby granted and not patented shall revert to the United States.

SEC. 5. *And be it further enacted*, That as soon as the governor of said State shall file or cause to be filed

with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

SEC. 6. *And be it further enacted*, That the United States mail shall be transported on said road, under the direction of the Post-Office Department, at such price as Congress may by law provide: *Provided*, That until such price is fixed by law, the Postmaster-General shall have power to fix the rate of compensation.

Approved, July 4, 1866.

### ACT OF 1887.

The portions of the act of March 3, 1887 (24 Stat., 556), which we deem applicable to this case:

CHAP. 376.—*An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.*

SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits, and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title hereto-

fore issued for such lands and to restore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or preemption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public-land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted, and patents of the United States shall issue therefor, and shall relate back to the date of the original certifi-

cation or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor

to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States; as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

### ACT OF MARCH 2, 1896 (29 STAT., 2.)

CHAP. 39.—*An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon-road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to

any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and

who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if, at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Approved March 2, 1896.

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